No. 97-2004

Supreme Court, U.S.
FILED
AUG 10 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN, MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER, LAZARO COLLAZO, ROBIN D. REIZLER, AND FRANK CRUZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE AMERICA EAST CONFERENCE, THE BIG TWELVE CONFERENCE, INC., BIG SKY CONFERENCE, INC., ATLANTIC COAST CONFERENCE, THE BIG TEN CONFERENCE, INC., CONFERENCE USA, METRO ATLANTIC ATHLETIC CONFERENCE, MID-CONTINENT CONFERENCE, NORTHEAST CONFERENCE, PACIFIC-10 CONFERENCE, SOUTHLAND CONFERENCE AND WEST COAST CONFERENCE IN SUPPORT OF NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

JAMES R. EISZNER
(Counsel of Record)
KEVIN R. SWEENEY
SUSAN A. BERSON
TIMOTHY M. HUSKEY
SHOOK, HARDY & BACON, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
(816) 474-6550

BRITTON BANOWSKY
Associate Commissioner
2201 Stemmons Freeway
28th Floor
Dallas, TX 75207
(214) 742-1212

Attorneys for Amicus Curiae The Big Twelve Conference, Inc.

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CHRIS W. BURFORD III
800 S. Broadway
Suite 209
Walnut Creek, CA 94596
(925) 937-4950

Attorney for Amicus Curiae Pacific-10 Conference

ARTHUR J. SIMON
SONNENSCHEIN, NATH & ROSENTHAL
8000 Sears Tower
Chicago, IL 60606-6404
(312) 876-7567

Attorney for Amicus Curiae Big Ten Conference, Inc.

BETH AMMONS
Assistant Commissioner & Legal Counsel
Southland Conference
8150 North Central Expressway
Suite 930
Dallas, TX 75206
(214) 750-7522

Attorney for Amicus Curiae Southland Conference

RICHARD HEIMBERG
BRADY & JENSEN
P.O. Box 807
Elgin, IL 60121
(847) 695-2000

Attorney for Amicus Curiae Association of Mid-Continent Universities

DAVID ARONOFSKY
University Hall
University of Montana
Missoula, MT 59812
(406) 243-4742

Attorney for Amicus Curiae Big Sky Conference, Inc.

ROBERT FULLER
ROBINSON, BRADSHAW & HINSON
101 North Tryon Street
1900 Independence Center
Charlotte, NC 28246
(704) 377-2536

Attorney for Amicus Curiae Conference USA

MELVIN S. NAROL
PELLETTIERI, RABSTEIN & ALTMAN
100 Nassau Park Boulevard
Suite 111
Princeton, NJ 08543
(609) 520-0900

Attorney for Amici Curiae America East Conference, Metro Atlantic Athletic Conference, Northeast Conference, and West Coast Conference

BYNUM M. HUNTER
SMITH, HELMS, MULLISS & MOORE, L.L.P.
P.O. Box 21927
300 North Greene Street
Greensboro, NC 27420
(336) 378-5296

Attorney for Amicus Curiae Atlantic Coast Conference

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE DECISION OF THE TENTH CIRCUIT GRAVELY THREATENS THE OPERATIONS OF INTERCOLLEGIATE ATHLETIC ORGANIZATIONS BECAUSE IT FAILS TO TAKE INTO CONSIDERATION THE ECONOMIC REALITIES OF INTERCOLLEGIATE ATHLETICS 4

II. THE FIFTH CIRCUIT COURT OF APPEALS AND OTHER COURTS HAVE PROPERLY RECOGNIZED THE IMPORTANCE OF COST REDUCTION EFFORTS TO INTERCOLLEGIATE ATHLETICS. HOWEVER, THE TENTH CIRCUIT'S REFUSAL TO DO SO CREATES A SPLIT IN THE CIRCUITS THAT THREATENS THE FUTURE OF THESE CONFERENCES UNLESS THE COURT GRANTS THE NCAA'S PETITION 7

A. The *Board of Regents* decision dictates that Courts should focus on the product of intercollegiate athletics in its entirety ... 7

B. The consequences of extremely limited institutional funding are important factors the Tenth Circuit should have considered 9

TABLE OF CONTENTS – Continued

Page(s)

III. THE ANALYSIS OF THE FIFTH CIRCUIT AND OTHER COURTS REFLECTS A PROPER UNDERSTANDING OF THE OPERATIONS OF INTERCOLLEGIATE ATHLETIC ORGANIZATIONS WHICH SHOULD BE EMBRACED BY BY THIS COURT INSTEAD OF THE TENTH CIRCUIT'S DECISION 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Chicago Board of Trade v. United States, 246 U.S. 231 (1918) 4

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) 12

Hennesey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) 8, 9

NCAA v. Board of Regents, 468 U.S. 85 (1984) .... *passim*

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 6

Standard Oil Co. v. United States, 283 U.S. 163 (1931) 5

United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967) 5

STATUTES

34 C.F.R. § 106.41 12

34 C.F.R. § 106.41(b) 12

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 12

Rule 37.6 1

APPENDIX

Bylaws of the Big Twelve Conference, Inc., § 1.3.1, §§ 1.5.2(b)(3), 1.5.3 ..... App. 1

Bylaws of Big Sky Conference, Inc., Article III .. App. 2

INTEREST OF AMICI

Amici are a group of college athletic conferences known as America East Conference, The Big 12 Conference, Inc., The Big Sky Conference, Inc., The Big Ten Conference, Inc., Conference USA, Metro Atlantic Athletic Conference, Association of Mid-Continent Universities (also known as the Mid-Continent Conference), Northeast Conference, Southland Conference, Pacific-10 Conference, Atlantic Coast Conference, and West Coast Conference. Like the NCAA, Amici organize and establish rules and standards that govern the athletic contests between their respective member institutions. Each conference's rules and regulations are designed to ensure that student athletics are available to all students and that athletic competition among conference member institutions is conducted in accordance with the educational goals of the universities and colleges belonging to the conference. The decisions below of the Tenth Circuit and the district court raise important issues for amici which can only be resolved if the petition for writ of certiorari is granted.[1]

SUMMARY OF ARGUMENT

The decisions below adopt an unsupported method for analyzing under the Sherman Act the lawfulness of rules and regulations established by intercollegiate athletic organizations. This Court has previously ruled that, with regard to such organizations, cooperation by the member institutions belonging to these organizations is necessary for the product of amateur intercollegiate athletics to exist at all and that, in evaluating what in other

---

[1] In compliance with Supreme Court Rule 37.6, amici state that no part of this brief was authored by any party or its counsel. Monetary support for this brief came exclusively from the amici on whose behalf the brief is filed.

contexts would be horizontal agreements and *per se* violative of the Sherman Act, the courts must employ a Rule of Reason analysis. *NCAA v. Board of Regents*, 468 U.S. 85, 99-103 (1984). Except in the Tenth Circuit, the courts have remained faithful to this ruling. In the decisions below, however, the trial court and the Court of Appeals engaged in a misguided application of the Rule of Reason that did not adequately take into account the need for intercollegiate athletic organizations to control inputs into intercollegiate athletics and failed to appreciate the economic differences between agreements to restrict inputs and agreements to restrict output. The courts below found without any market analysis that there were anticompetitive effects from the restriction at issue, placed a heavy burden on the NCAA to show the procompetitive effects of the restriction, and then rejected the NCAA's justifications without adequately evaluating the need for the restriction. Moreover, the courts below failed to understand that intercollegiate athletic organizations are democratic in nature.

The decisions below impact amici in several ways. First, the Tenth Circuit decision threatens the ability of amici and other intercollegiate athletic organizations to regulate athletics in a way that is consistent with the educational objectives of their member institutions.[2]

---

[2] All of the member institutions of amici are also members of the NCAA. Like the NCAA, each of the amici has established rules and standards that govern the athletic competitions that they organize. The NCAA establishes minimum standards and rules for collegiate athletics. In most instances, a collegiate athletic conference will establish rules and standards for its members because the NCAA standards and rules are not sufficient to meet the educational goals of the member institutions of the conference. Consequently, these conference standards and rules are often more restrictive than those of the NCAA.

Absent an ability to regulate the inputs that go into intercollegiate athletics,[3] some educational institutions may need to drop certain sports programs that are not financially self-sustaining. Moreover, in the long-run, if the costs of inputs into intercollegiate sports programs cannot be controlled to reduce informational costs of scheduling – the cost of locating opponents that will offer exciting, competitive match-ups – and to ensure that particular sports programs remain true to the educational objectives of each of the member institutions of amici and the NCAA, colleges and universities may sharply curtail programs. Finally, because the decisions below created a split in the Courts of Appeals regarding the evaluation of input restrictions implemented by intercollegiate organizations, the decisions threaten the competitiveness of intercollegiate athletic conferences that have as members colleges and universities located within the Tenth Circuit.[4] Indeed, the split of authority created by the decisions below may threaten the future of these conferences: colleges and universities that are members of these conferences but are not themselves located within the Tenth Circuit may withdraw from the conferences in order to maximize their ability to regulate their intercollegiate sports programs and to minimize their legal liability from regulations adopted for this purpose. For these reasons,

---

[3] Among the key inputs that go into intercollegiate sports are student-athletes and coaches. Rules on academic eligibility and limits on team size serve to restrict the former input by limiting the number of student athletes that can participate in intercollegiate sports. Rules restricting the number of coaches and limiting compensation paid for coaches can restrict the latter input.

[4] Among the conferences with member institutions located in the Tenth Circuit are the Big Twelve Conference, the Big Sky Conference, and the Western Athletic Conference.

amici entreat the Court to grant the NCAA's petition for a writ of certiorari, to resolve the conflict among the Circuits, and to reverse the decision by the Court of Appeals for the Tenth Circuit below.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT GRAVELY THREATENS THE OPERATIONS OF INTERCOLLEGIATE ATHLETIC ORGANIZATIONS BECAUSE IT FAILS TO TAKE INTO CONSIDERATION THE ECONOMIC REALITIES OF INTERCOLLEGIATE ATHLETICS.

Unless a restriction falls into the categories of restraints that are *per se* illegal – and there is no question here that the *per se* label should not apply to the restraint at issue below[5] – it is important that a court evaluating a restriction under Section 1 of the Sherman Act understand the economic context in which the restraint has been imposed. Indeed, in formulating the contours of the Rule of Reason analysis, this Court held:

> To determine [the reasonableness of a restraint] the court must ordinarily consider the facts peculiar to the business to which the restraint was applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). As more fully discussed below, the Court of

---

[5] *See NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 101 (1984).

Appeals below made no effort to evaluate the economic context of intercollegiate athletics because of the unsupported method it employed for conducting a Rule of Reason analysis in the context of intercollegiate athletics.

The Tenth Circuit completely ignored the economic realities that face the NCAA and amici. For example, the plaintiffs were spared from having to prove any adverse economic impact on consumer welfare arising from the restriction. In turn, the NCAA's justifications for the restriction were rejected without any consideration of the economic realities that it confronts. As a result, the decision below threatens the future of intercollegiate athletics. Unless the Court grants the petition for certiorari and considers the issues surrounding the restriction in light of market realities, every subsequent restraint imposed by the NCAA or amici to regulate inter-collegiate athletics may be scrutinized, especially by courts in the Tenth Circuit, for lawfulness under the antitrust laws pursuant to an analytic framework that assumes economic harm resulting from the restraint and discounts the economic benefits flowing from the restraint simply because the court can hypothesize what it deems to be a more effective method of accomplishing the goals of the regulating body.

Under the Rule of Reason, the plaintiff bears the burden of proof to demonstrate that the restraint is unreasonable. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 374 n. 5 (1967); *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931). Here, the Court of Appeals effectively failed to leave the burden of persuasion with the plaintiff. Its stated rationale for doing so was this Court's prior holding that *per se* analysis of horizontal restraints imposed by intercollegiate sports organizations is inappropriate because intercollegiate sports "involves an industry in which horizontal restraints on competition

are essential if the product is to exist at all." *NCAA v. Board of Regents*, 468 U.S. at 101; (Pet. App. at 12a). Rather than applying the Rule of Reason to the restraint at issue and imposing the burden of persuasion on plaintiffs, the Court of Appeals presumed, contrary to the dictates of *Board of Regents*, that the restraint would have a strong anticompetitive impact because – absent the holding in *Board of Regents* – the restriction would be *per se* unreasonable.[6] It then required the NCAA to prove that the restraint was reasonable. (Pet. App. at 19a). In so doing, as a practical matter the court placed the burden of persuasion on the defendant to prove the overall reasonableness of the restraint, contrary to the express holding in *Board of Regents* and this Court's prior pronouncements that the plaintiff bears the burden of showing that a restraint is unreasonable.

Moreover, the Court of Appeals approached with skepticism the justifications for the restraint proffered by the NCAA. The Court simply substituted its judgment for how the NCAA could best accomplish its objectives, determined that the NCAA had not imposed a restriction that would most effectively accomplish its objectives, and

---

[6] The Tenth Circuit reasoned that the restraint in question is "price-fixing" which has "obvious anticompetitive effects." (Pet. App. at 17a). The court, however, ignored that the restriction was not an agreement on the prices for which competitors would *sell* their output, (the traditional definition of price-fixing,) but an agreement on what the competitors would *pay* for inputs into their product. Joint purchasing arrangements are not obviously anticompetitive. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985). Thus, unlike some horizontal restrictions that may be quickly condemned, the restraint at issue here could not be peremptorily declared to have an obvious anticompetitive effect. A market analysis was required but not undertaken by the court below.

then rejected the NCAA's justifications as pretexts. The court further rejected the NCAA's cost reduction justification because it speculated that a more effective way to accomplish this objective would be to limit the total expenditures that member institutions spend on basketball. (Pet. App. at 24a). The competitive balance and preservation of entry level coaching position justifications were rejected because the Tenth Circuit speculated that the NCAA could accomplish this objective by placing a limit on the amount of experience a restricted earnings coach could have. (Pet. App. at 21a, 25a). Amici do not contend that justifications can never be pretextual or insufficient; rather, amici are concerned that the Tenth Circuit second-guessed the NCAA freely and without any attempt to put the decision of the organization to impose the restriction into context, from both an economic and a political standpoint.

II. THE FIFTH CIRCUIT COURT OF APPEALS AND OTHER COURTS HAVE PROPERLY RECOGNIZED THE IMPORTANCE OF COST REDUCTION EFFORTS TO INTERCOLLEGIATE ATHLETICS. HOWEVER, THE TENTH CIRCUIT'S REFUSAL TO DO SO CREATES A SPLIT IN THE CIRCUITS THAT THREATENS THE FUTURE OF THESE CONFERENCES UNLESS THE COURT GRANTS THE NCAA'S PETITION.

A. The *Board of Regents'* decision dictates that Courts should focus on the product of intercollegiate athletics in its entirety.

In contrast to the decision of the Tenth Circuit, other courts have properly considered why horizontal restraints by intercollegiate sports organizations are necessary for the existence of the product they offer. These courts have understood that the "product" at issue is

competitive intercollegiate sports in their entirety, not an individual institution's specific sports program. For example, in *Hennesey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) (*per curiam*), the Court of Appeals reasoned that cost reduction efforts by the NCAA, in the form of a limit on the number of assistant coaches, were reasonable because they were designed to help ensure that intercollegiate athletic programs would be provided in many sports:

> Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics. Financial pressures upon many members, not merely to 'catch up' but to 'keep up,' were beginning to threaten both the competitive, and amateur, nature of the programs, leading quite possibly to abandonment by many. 'Minor' and 'minority' sports were viewed as imperiled by concentration upon the 'money makers,' such as varsity football and basketball.

564 F.2d at 1153.

The Tenth Circuit below specifically rejected the reasoning of the Fifth Circuit in *Hennesey*: "We are dubious that the goal of cost reductions can serve as a legally sufficient justification for a buyers' agreement to fix prices *even if such cost reductions are necessary to save inefficient or unsuccessful competitors from failure.*" (Pet. App. at 23a-24a) (emphasis added). This approach is in direct conflict with *Hennesey*[7] as well as with the holding

---

[7] Indeed, *Hennesey* sustained as lawful under Section 1 of the Sherman Act an NCAA restriction on the number of assistant coaches that a member institution could employ in men's basketball and football. *Hennesey*, 564 F.2d at 1153. The

of this Court in *Board of Regents* that *per se* rules should not apply to intercollegiate athletic organizations because horizontal restraints may be necessary for the "product" of competitive intercollegiate sports to be available at all. *See Board of Regents*, 468 U.S. at 101.

Intercollegiate athletics, in general, is the product as the *Board of Regents'* decision dictates. *Compare* Pet. App. at 12a-13a ("The 'product' made available by the NCAA in this case is college basketball . . . "), *with Board of Regents*, 468 U.S. at 101-02 ("What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. . . . ").

B. The consequences of extremely limited institutional funding are important factors the Tenth Circuit should have considered.

In fact, and contrary to the view adopted by the Tenth Circuit, efforts at cost reduction and other restrictions on inputs are necessary for the "product" of competitive intercollegiate athletics to exist at all. Within an educational institution, intercollegiate athletic programs compete with academic and technical programs for funding. Funding is not unlimited. Importantly, not one

---

Tenth Circuit now holds that an NCAA restriction on the maximum salary that could be paid to one of four permitted men's basketball coaches at each member institution would violate Section 1 of the Sherman Act. Since *Hennesey* would permit the NCAA to decide that there could only be three basketball coaches, it is hard to see how the present plaintiffs, all of whom were subject to the salary restriction, would have been harmed less if the NCAA had decided to limit the total number of coaches to three. The Fifth Circuit's reasoning is the proper statement of the law. However, the Tenth Circuit's finding that *Hennesey* is not good law creates a split in the Courts of Appeals that this Court should resolve.

educational institution of any of amici has as its primary purpose the sponsoring of sporting contests. Indeed, all member institutions have academic goals as their primary purpose.[8] As a result, few if any educational institutions devote significant funds from tuition or state funding to athletics. Typically, colleges and universities require either that their athletic departments pay for themselves or be able to operate on a tiny fraction of the institution's total funding.[9] One study of intercollegiate athletics at NCAA Division 1-A member institutions showed that in 1995, on average, athletic departments operated at a small

---

[8] The purposes of the conferences are tied to the educational missions of their member institutions. For example, the Big Twelve Conference has among its purposes the objectives of "formulat[ing] principles to guide the conduct of the athletic programs of the highest quality and character *consistent with the missions of the Member Institutions*," "build[ing] upon the alliance fostered by the Conference's athletic programs *to advance the academic missions of the Member Institutions*" and "assist[ing] its Member Institutions in the maintenance of programs of intercollegiate athletics *which are compatible with the highest standards of education*." Bylaws of The Big Twelve Conference, Inc., § 1.3.1 (emphasis added). *See also*, Bylaws of Big Sky Conference, Inc., Art. III ("The members of this Conference are dedicated to a continuing effort to maintain intercollegiate athletics in harmony with the essential educational purposes of each member's institution.").

[9] For example, in the Pacific-10 Conference, one member institution provides no funding to its athletic department, requiring the athletic programs of the school to operate on funds generated solely by the athletic department, while another institution provides no financial support for its athletic department beyond tuition waivers for some of the institution's athletes. In contrast, three other institutions have budgets that are funded in part by revenues from outside the institution's athletic revenues, ranging from ten to over twenty percent of the total budget.

loss ($237,000), with men's programs, on the whole, producing net revenues and women's programs operating at a net loss. *See* Daniel L. Fulks, *Revenues and Expenses of Divisions I and II Intercollegiate Athletic Programs-1995*, Attachment 3, at 13 (U. of Kentucky School of Accountancy 1995).

The extremely limited institutional funding available for college athletics has important consequences for athletic departments. Only a few college sports generate revenues sufficient to pay for their own program, most notably basketball and football. For example, in The Big 12 Conference, the members of the Conference offer intercollegiate athletic programs in between 8 to 12 sports for male students and from 9 to 12 sports for female athletes. Yet members of the conference reported generating net revenues in only two programs: men's basketball and men's football. Similarly, in the Big Sky Conference there are nine member institutions, each offering from 12 to 20 intercollegiate sports for male and female students. Of the nine institutions, only four schools had sport programs that generated net revenues: three schools that generated net revenues from their men's basketball program and one school that had both its men's football and men's basketball program produce revenues in excess of program expenses.

Unless institutions are able to restrict the amount of funding devoted to paying programs, there will not be sufficient funding for many non-paying programs,[10] and non-revenue sports would have to be dropped, a result

---

[10] Even small cost savings in the paying programs can pay for a program that is not financially self-sustaining. For example, one member of the Pacific-10 Conference has an intercollegiate fencing program that requires $30,000 in total funding. Only a minuscule portion of the needed revenues is generated by the program itself.

directly inconsistent with the purpose of intercollegiate athletics. The purpose of an educational institution in offering intercollegiate athletics is based on the premise that it is an important option to be made available to all students for their educational development, not merely to those who can participate in a sport where the program can be financially self-supporting.[11] Consequently, it is important that educational institutions be able to restrict the funding that is devoted to financing those programs that are financially self-supporting. Yet the Tenth Circuit simply dismissed these issues without discussion: "[W]e

---

[11] There are also legal reasons for educational institutions to evaluate the funding of their intercollegiate athletic programs as a whole rather than on a program-by-program basis. Almost all of the member institutions of the NCAA and the conferences are subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, which prohibits gender-based discrimination by educational institutions receiving federal funding. The Department of Education has adopted regulations to implement Title IX in the context of college sports. *See* 34 C.F.R. § 106.41. In general, gender segregated sports are prohibited under these regulations unless the sport is a contact sport or the institution offers comparable teams in the sport for both genders. *See* 34 C.F.R. § 106.41(b). The decisions below simply ignored the legal realities faced by educational institutions who must comply with Title IX. There is reason to doubt that federally-funded educational institutions could justify offering a men's basketball program that paid for itself and fail to offer a women's basketball program because that program would not be financially self-sustaining. As one court has noted, "Title IX does not purport to override financial necessity. Yet, the pruning of athletic budgets cannot take place in comptrollers' offices, isolated from the legislative and regulatory imperatives that Title IX imposes. . . . [E]ven a balanced use of the budget-paring knife runs afoul of Title IX where, as here, the fruit's of a university's athletic program remains ill-distributed after the budget trimming takes place." *Cohen v. Brown University*, 991 F.2d 888, 905-906 (1st Cir. 1993).

need not consider whether cost reductions may have been required to 'save' intercollegiate athletics . . . There is no reason to think that money saved by a school on the salary of a restricted earnings coach will not be put into another aspect of the school's basketball program." (Pet. App. at 24a).

Individual decisions by educational institutions to restrict funding for their paying sports programs are difficult because of the need to schedule contests that will be attractive to consumers. The public will rarely pay to watch intercollegiate contests where the teams are not of relatively equal strength and able to engage in a competitive contest. If the public believes that an athletic contest, which they are asked to pay to view, does not offer a match up in which either side could prevail or that otherwise promises to be an exciting game, it is unlikely they will pay for the privilege of viewing. In that event, even the sports programs that currently pay for themselves may no longer be self-sustaining. To avoid this result, a single institution would have to do the impossible and the impractical. That is, a single institution would have to find some way to restrict unilaterally funding for its paying programs while at the same time search for other institutions that have done about the same to include on its schedule. We submit that it is impractical if not impossible for a single institution to restrict its funding, unilaterally, and hope to compete effectively or, for that matter, schedule comparable opponents at all.

The very existence of a conference serves to reduce scheduling costs among its member institutions and aids in maintaining a competitive balance among the various colleges and universities. For example, a typical team schedule is comprised of a high percentage of contests

with other teams in its conference.[12] Moreover, the conference is able to establish rules and regulations that help to level the playing field of the teams of the conference in a way that is consistent with the educational objectives of the institutional members of the conference. These rules and regulations supplement those of the NCAA. The NCAA restriction on coaches salaries at issue here, NCAA limitations on payments that may be made to student-athletes, as well as the minimum academic standards for student-athletes and limitations placed on athletic eligibility imposed by the NCAA and the conferences, all help serve to reduce the overall informational costs of scheduling and to maintain a competitive balance in intercollegiate athletics.

Rules and regulations designed to reduce costs in financially self-supporting sports help to increase output by permitting the funding of other athletic programs that are not financially self-sustaining. These regulations thereby allow an educational institution to offer the educational benefits of intercollegiate athletics[13] to a broad range of students, rather than simply those students who have the ability to compete in sports that are financially self-sustaining. These restrictions also improve the quality of output thereby improving the likelihood of evenly

---

[12] In the Pacific-10 Conference, over two-thirds of all men's and women's basketball games played by its member institutions are accounted for by intraconference games. Slightly over half of all men's baseball and women's softball games played by all member institutions of the conference are intraconference contests.

[13] Among the educational benefits of intercollegiate sports are the teaching of good sportsmanship, teaching students the benefits of effort, dedication, and teamwork, and to help students to learn time management skills and to deal with adversity.

matched, exciting athletic contests.[14] Finally, the restrictions reduce the costs of scheduling sporting events that are likely to be exciting and therefore attractive to paying fans.

III. THE ANALYSIS OF THE FIFTH CIRCUIT AND OTHER COURTS REFLECTS A PROPER UNDERSTANDING OF THE OPERATIONS OF INTERCOLLEGIATE ATHLETIC ORGANIZATIONS WHICH SHOULD BE EMBRACED BY THIS COURT INSTEAD OF THE TENTH CIRCUIT'S DECISION.

The logic of the court of appeals below in summarily rejecting these justifications evinces a lack of understanding of the way in which intercollegiate organizations work. The Court of Appeals reasoned that the restriction in question was either ineffectual or pretextual because there were better ways to accomplish the NCAA's stated purposes in passing the rule. It found that the restriction in question could not have been intended to preserve entry-level coaching positions or to maintain competitive

---

[14] The Tenth Circuit found that the restriction in question prevented individual schools from competing to improve the quality of individual teams by competing to hire coaches. (NCAA Cert. Petition at 22a). In so doing, the court ignored that the "product" in question is not an individual athletic team at an individual school, but competitive intercollegiate sports as a whole. *See Board of Regents*, 468 U.S. at 101.

Moreover, even if the focus were more narrow, the product is no more narrow than a particular intercollegiate athletic sporting contest. Few would argue that lopsided contests are of higher quality to fans than closely-matched, see-saw contests. Yet this is precisely the counterintuitive – and incorrect – conclusion that is implicit in the analysis of the court of appeals below.

balance among schools because it did not prohibit experienced coaches from filling the positions in question. (Pet. App. at 21a, 25a). Moreover, it reasoned that the restriction in question could not serve to reduce costs because the restriction "does not equalize the amount of overall money Division 1 schools are permitted to spend on their basketball programs." (Pet. App. at 24a). In so doing, the Tenth Circuit assumed that intercollegiate sports organizations operate as a centrally planned monolith with a single decision maker. This assumption is incorrect.

Like the NCAA, amici operate as democratic institutions and decisions are based on a consensus.[15] Not all schools face exactly the same funding issues: some member institutions may provide some funding for their athletic programs, while others do not;[16] even within the same athletic conference, not all member institutions offer the same sports programs;[17] not all member institutions derive the same revenues from their athletic programs;[18]

---

[15] For example, the By laws of The Big Twelve Conference provide that all regulations for the conduct of sporting contests and athletic programs must be approved by a democratic vote of the member institutions. By laws of The Big Twelve Conference, Inc., §§ 1.5.2(b)(3), 1.5.3 (vote of 75% of directors with each member institution having one director). The by-laws of the other amici also require a democratic decision on such regulations.

[16] *See* n. 9, *supra*.

[17] In the Pacific-10 Conference, Stanford University offers 17 intercollegiate athletic programs for men and 18 for women, whereas Washington State University offers six men's programs and nine programs for women.

[18] For example, in the Big Sky Conference, the member institution that generates the most revenue from its athletic programs has revenues that are 194% of the revenues generated by the member institution that has the lowest revenues from intercollegiate athletics. For 1995 in all of Division 1-A, the

and some members are public institutions while others are private.[19] Given the varying interests of the member institutions of an intercollegiate organization, it is hardly surprising that the democratic process yields rules that may not be perfectly tailored to the goals of the intercollegiate athletic organization. The Tenth Circuit's assumptions regarding the most efficient means to accomplish the NCAA's stated objectives simply ignore the reality that intercollegiate sports organizations uniformly employ a democratic method of governance and that the interests of the individual member institutions belonging to the organization are varied.

If member institutions have no assurance that a democratic process will protect them, they may withdraw from their intercollegiate athletic conferences. Ultimately, the viability of the conferences will be threatened and the costs of scheduling athletic contests will rise. Consumers of the intercollegiate athletics market may also be deprived of the traditional rivalries which are often fostered by the existence of conferences.

Unless the Court grants the petition of the NCAA and reviews these decisions, colleges and universities, especially those located within the confines of the Tenth Circuit, will lose the ability to regulate their intercollegiate athletic programs so that they remain true to their

---

institution with the intercollegiate athletic programs that generated the most revenue earned 2.6 times as much revenue as the average revenue generated by all schools. Fulks, *supra*, at Attachment 3, p. 13.

[19] In the Big Ten Conference, ten of the member institutions are public while one is private. Eight of the Pacific-10 Conference's member institutions are public and two are private. In the Big Twelve Conference, all member institutions except one are public.

educational goals. In the near term, the viability of conferences with member institutions located within the confines of the Tenth Circuit will be threatened as institutions not located within the bounds of the Tenth Circuit seek to align themselves with conferences not subject to jurisdiction in the Tenth Circuit. Students who participate in athletic programs that are not financially self-sustaining will face reduced funding for, and possible elimination of, the sports programs in which they participate. The quantity and quality of intercollegiate athletics will decline. If these results are not mandated by the antitrust laws, these consequences need not be endured.

CONCLUSION

The decisions below have important consequences for intercollegiate athletics. The consequences discussed herein can only be avoided if this Court grants the NCAA's petition for a writ of certiorari and decides the case on the merits. Amici respectfully submit that the Court should grant the petition and reverse the decision below.

Respectfully submitted,

JAMES R. EISZNER
(Counsel of Record)
KEVIN R. SWEENEY
SUSAN A. BERSON
TIMOTHY M. HUSKEY
SHOOK, HARDY & BACON, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
(816) 474-6550

BRITTON BANOWSKY
Associate Commissioner
The Big-12 Conference
2201 Stemmons Freeway
28th Floor
Dallas, TX 75207
(214) 742-1212

Attorneys for Amicus Curiae The Big Twelve Conference, Inc.

CHRIS W. BURFORD III
800 S. Broadway
Suite 209
Walnut Creek, CA 94596
(925) 937-4950

Attorney for Amicus Curiae Pacific-10 Conference

ARTHUR J. SIMON
SONNENSCHEIN, NATH & ROSENTHAL
8000 Sears Tower
Chicago, IL 60606-6404
(312) 876-7567

Attorney for Amicus Curiae Big Ten Conference, Inc.

BETH AMMONS
Assistant Commissioner & Legal Counsel
Southland Conference
8150 North Central Expressway
Suite 930
Dallas, TX 75206
(214) 750-7522

Attorney for Amicus Curiae Southland Conference

DAVID ARONOFSKY
University Hall
University of Montana
Missoula, MT 59812
(406) 243-4742

Attorney for Amicus Curiae Big Sky Conference, Inc.

ROBERT FULLER
ROBINSON, BRADSHAW & HINSON
101 North Tryon Street
1900 Independence Center
Charlotte, NC 28246
(704) 377-2536

Attorney for Amicus Curiae Conference USA

MELVIN S. NAROL
PELLETTIERI, RABSTEIN & ALTMAN
100 Nassau Park Boulevard
Suite 111
Princeton, NJ 08543
(609) 520-0900

Attorney for Amici Curiae America East Conference, Metro Atlantic Athletic Conference, Northeast Conference, and West Coast Conference

RICHARD HEIMBERG
BRADY & JENSEN
P.O. Box 807
Elgin, IL 60121
(847) 695-2000

Attorney for Amicus Curiae Association of Mid-Continent Universities

BYNUM M. HUNTER
SMITH, HELMS, MULLISS & MOORE, L.L.P.
P.O. Box 21927
300 North Greene Street
Greensboro, NC 27420
(336) 378-5296

Attorney for Amicus Curiae Atlantic Coast Conference

August 10, 1998
Kansas City, Missouri

APPENDIX

THE BIG TWELVE CONFERENCE, INC. BYLAWS

(in pertinent part)

1.3.1 *Purposes.* The purposes of the Conference are to:

1.3.1.3 Formulate principles to guide the conduct of athletic programs of the highest quality and character consistent with the missions of the Member Institutions and the Conference.

1.3.1.4 Promote and coordinate programs of academic cooperation and build upon the alliance fostered by the Conference's athletic programs to advance the academic missions of the Member Institutions.

1.3.1.5 To assist its Member Institutions in the maintenance of programs of intercollegiate athletics which are compatible with the highest standards of education and competitive sports. To this end, through the orderly establishment and enforcement of legislation, the Conference aims to:

(a) Regulate intercollegiate athletics among the Member Institutions;

(b) Encourage sound academic practices for student-athletes;

(c) Stimulate good sportsmanship; and

(d) Promote mutual trust and friendly intercollegiate athletic relations between Member Institutions.

1.5.2 *Powers Reserved to the Board of Directors and Vote Required.*

(b) The following actions may be taken only if approved by the affirmative vote of seventy-five percent (75%) of more of the Directors then in office:

(3) Amendments or modifications to the role and authority of the Board of Directors and the Advisory Committees.

1.5.3 *Number, Election and Term.* The number of Directors of the conference shall equal the number of Member Institutions in the Conference, consisting of one (1) representative for each Member Institution, who shall be the Chief Executive Officer (President or Chancellor) of each Member Institution. Annually, each Member Institution shall certify to the Conference the name of its Chief Executive Officer (President or Chancellor) and such person shall be elected as a Director as provided in these Bylaws and shall hold office until his or her successor has been elected or appointed and has qualified. Because of the special relationship of the Directors to the Member Institutions, a Director may not be removed as long as the Director is the Chief Executive Officer (President or Chancellor) of a Member Institution.

BIG SKY CONFERENCE, INC.
BYLAWS
(in pertinent part)

ARTICLE III

The members of the Big Sky Conference subscribe to the principle that intercollegiate athletics is a vital part of higher education, is regarded as an integral part of the educational program, and the intercollegiate athletic experience is equally valuable for both male and female students. The member Institutions are committed to providing athletic opportunities on an equitable basis without regard to gender. The intercollegiate athletic

programs shall be administered and conducted in a manner consistent with the institutions' educational policies.

Fundamental to the successful application of any set of rules is the spirit of mutual confidence and cooperation. It is the function of this Conference to encourage intercollegiate athletics on an amateur basis with institutional control.

The members of this Conference are dedicated to a continuing effort to maintain intercollegiate athletics in harmony with the essential educational purposes of each members' institution. To reinforce these principles, the Big Sky Conference believes in and subscribes to the fundamental purposes, policies, and principles governing the conduct of intercollegiate athletics as adopted by the National Collegiate Athletic Association (NCAA). These include the purposes and fundamental policy contained in Article 1 of the NCAA Constitution. The principles for conduct of intercollegiate athletics are found in Article 2 of the NCAA Constitution and include the following principles:

Institutional Control and Responsibility
Student-Athlete Welfare
Gender Equity
Sportsmanship and Ethical Conduct
Sound Academic Standards
Nondiscrimination
Diversity Within Governance Structures
Rules Compliance
Amateurism
Competitive Equity
Recruiting
Eligibility
Financial Aid

App. 4

Playing and Practice Seasons
Postseason Competition and
Contests Sponsored by
Non-collegiate Organizations
Economy of Athletics Program
Operation